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## CONSTITUTIONAL PROBLEMS INVOLVED IN THE McCOOK CASE.\*\*

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### I. THE GOVERNOR'S APPROVAL OF LEGISLATION IN CONNECTICUT.

The Supreme Court of Errors of Connecticut in the case of *State v. McCook*, decided July 25, 1929, determined an important question as to the time within which the governor may approve legislation in this State. Article IV, sec. 12 of the constitution of Connecticut, framed in 1818, is, with verbal changes, and with differences of the period for executive consideration and in legislative majorities, substantially the same as the provision of the constitution of the United States with respect to executive approval or disapproval of legislation. The Connecticut provision reads as follows:

"Every bill which shall have passed both houses of the General Assembly, shall be presented to the Governour. If he approves, he shall sign and transmit it to the Secretary, but if not, he shall return it to the house in which it originated, with his objections, which shall be entered

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\*\*This case is now reported in 147 Atl. 127.

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on the journals of the house; who shall proceed to reconsider the bill. If after such reconsideration, that house shall again pass it, it shall be sent, with the objections, to the other house, which shall also reconsider it. If approved, it shall become a law. But in such cases the votes of both houses shall be determined by yeas and nays; and the names of the members voting for and against the bill, shall be entered on the journals of each house respectively. If the bill shall not be returned by the Governor within three days, Sundays excepted, after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it; unless the General Assembly, by their adjournment, prevents its return, in which case it shall not be a law."

The last sentence of this provision is the most important and the least clear. The power of the governor to approve bills after legislative adjournment has become increasingly important in Connecticut and in all other states, because of the legislative practice of passing the bulk of legislation in the last few days of the session. The *McCook* case involved the governor's approval of a measure passed in 1925. Of the 779 bills passed by the Connecticut General Assembly in that year, 322 came to the governor after final adjournment of the legislature. The number and proportion of the bills so coming to the governor after adjournment was substantially larger in 1927 and 1929.

The Connecticut General Assembly adjourned on June 3, 1925. The measure here involved was presented to the governor on June 22, 1925, and was signed by him on the day of presentation. Although basing its decision that the act was invalid partly upon other grounds, the court held that "bills presented to the governor may not be signed by him more than three days (Sundays excepted) after the final adjournment of the General Assembly."

The Connecticut constitutional provision is capable of at least four constructions:

- (1) It may be argued with some plausibility that the words, "unless the General Assembly, by their adjournment, prevents

its return" relates of necessity only to disapproved bills, and that approved bills are not to be returned. This view is supported by language of Judge Denio in *People v. Bowen*,<sup>1</sup> with reference to a similar New York provision:

"It is plain that this relates exclusively to bills which the Governor has neglected to approve and sign. It is such bills, and not those which he has approved and signed, which are not to become laws on account of a premature adjournment of the legislature. The provision does not qualify the mandate contained in the earlier part of the section, by which it is enjoined upon the Governor, that, if he approves of a bill, he shall sign it. I am, therefore, of opinion that there is nothing in the language of the Constitution forbidding the approving and signing of a bill by the Governor after the session of the legislature shall have terminated by an adjournment. If he cannot legally do so, it is on account of some implication arising out of the nature of the subject or of the act to be performed, or the general arrangements of the Constitution. \* \* \*

"It is argued that, upon the construction which I have suggested, no time whatever is fixed within which bills are, in such cases, to be signed, and that, if it can be done after the adjournment, it may be done at any indefinite period thereafter; and that the inconvenience would arise, that it might remain a long time uncertain whether a measure which has received the assent of both branches of the legislature should eventually be a law or not. This consequence will certainly follow, unless there is an implication arising out of the fixing of a period of ten days for the consideration of bills presented to the Governor while the legislature remain in actual session. It is plain that the authors of the Constitution considered that period sufficiently long for the performance of that duty; and I think he would not be justified in acting upon a bill after his ten days had elapsed, whether the session continued or not. But, if this were otherwise, it would

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<sup>1</sup> *People v. Bowen*, 21 N. Y., 517, at p. 519, 520 (1860).

not afford a reason for adding to the Constitution, by a judicial determination, a qualification of the power of the Governor to approve bills which is not contained in the instrument. The Constitution does not often prescribe detailed provisions for the regulation of the departments of the Government. A general power is usually conferred, and it is then left to the legislature to provide by law as to the time and manner of its performance. But if we concede that the limitation of ten days does not apply, and that a limitation cannot be fixed by law. I am of opinion that the concession would not authorize a determination against the existence of the right to approve bills after the adjournment. It would plainly be the duty of the Governor to act upon such bills as had been left in his hands on the adjournment, at the earliest practicable time thereafter. The nature of the duty, and the inconveniences of delay, would sufficiently inculcate the obligation of diligence in that respect. \* \* \*

But, as Judge Denio's language indicates, it was unnecessary in this case to go beyond holding that the governor's power extended to a fixed number of days beyond adjournment. Under the view suggested by Judge Denio there is no time limit upon the governor's power to approve, and in Connecticut he would have been able to act favorably upon bills passed by the legislature in 1925, during the period from June, 1925 to January, 1927. This alone properly leads to a rejection of the construction, especially when coupled with a constitutional or statutory provision as to the date upon which new legislation shall become effective. Such a proposed construction would also neglect the effect of the first clause of the sentence, which by limiting the governor's period for either favorable or unfavorable consideration during the session, evidences an intention opposed to an unlimited period for consideration after adjournment. The Connecticut court quite properly rejected such a construction.

(2) It may be argued with equal plausibility that any return of the bill ceases to be possible immediately upon the adjournment of the General Assembly, and that upon such adjournment, therefore, return being prevented, the "bill shall not

be a law." This would require that, if it is to become law, through approval by the governor, every bill be presented to the governor and acted upon by him before legislative adjournment. With a few exceptions this has been the practical construction of substantially identical language in the constitution of the United States. A different view was taken by President Wilson in 1920, with the approval of the Attorney General of the United States, and was the occasion for a valuable discussion of the problem by Professor Lindsay Rogers.<sup>2</sup> The view that no power exists to approve after legislative adjournment proceeds largely on the theory that the governor is acting as a branch of the legislature and not as an executive, and has the support of decisions in California,<sup>3</sup> Nevada,<sup>4</sup> and Mississippi,<sup>5</sup> of an opinion of the justices in Massachusetts,<sup>6</sup> and of opinions of the Attorney General of the United States before 1920. But the view of the Attorney General has been altered;<sup>7</sup> constitutional changes in California, Massachusetts and Nevada have rendered the decisions in those states inapplicable; and the Mississippi court reversed its decision in 1887.<sup>8</sup> It is true that the Mississippi constitution of 1890 expressly provides that "no bill shall be approved when the legislature is not in session," but this express provision lends no aid to the suggested construction of the Connecticut provision. Such a construction has little support in present authorities, and is based upon an erroneous theory of the governor's power over legislation. The governor is not acting as an organ of the legislative department but as an executive exercising a qualified veto power conferred upon him by the constitution.<sup>9</sup>

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<sup>2</sup> Rogers, *The Power of the President to Sign Bills after Congress has Adjourned*, (1920), 30 *Yale Law Journal* 1.

<sup>3</sup> *Fowler v. Peirce*, 2 Cal. 165 (1852). See also suggestion in *Solomon v. Commissioners of Cartersville*, 41 Ga. 157 (1870).

<sup>4</sup> *Trustees of School District No. 1 v. County Commissioners of Ormsby County*, 1 Nev., 334 (1865).

<sup>5</sup> *Hardee v. Gibbs*, 50 Miss., 802 (1874).

<sup>6</sup> *Opinion of the Justices*, 3 Mass., 567 (1791).

<sup>7</sup> 32 *Opinions of the Attorney General*, 225 (1920).

<sup>8</sup> *State ex rel Attorney General v. Board of Supervisors of Coahoma Co.*, 64 Miss., 358; 1 So. 501 (1887).

<sup>9</sup> See *Board of Education v. Morgan*, 316 Ill., 143 (1925), and *Hartness v. Black*, 95 Vt., 190, 201 (1921).

(3) A third possible construction is that the constitution expressly gives to the governor a period of three days after the presentation of each bill in which to approve it or to return it with his objections. No exceptions are made and none exist. There is a continuing power to approve during this time, irrespective of adjournment, and the three days given to the governor with respect to the bill, by the explicit terms of the constitution, run from the time that "it shall have been *presented* to him." The allotted period is for executive consideration of the bill, and he cannot begin to consider it until it has been presented to him. In a prior decision<sup>10</sup> the Connecticut court had said:

"The commencement of this period of not exceeding three days, given by the Constitution to the Governor for the consideration of every bill which has been duly passed by both houses, is certain. It begins when the bill is presented to him. It cannot be deemed to have been presented to him until it has been in some way put into his custody, or into that of some one properly representing him, in such a manner that he has a reasonable opportunity to inspect and consider it."

The view that the executive may approve after adjournment within the constitutionally prescribed period is not only the more practical, but is more directly in line both with the language and with the purpose of the constitution. It is the more commonly adopted construction of constitutional provisions similar to that of Connecticut. If a power exists to approve after adjournment, and is limited to the days prescribed in the constitution, it would appear necessarily to follow that the period begins to run upon *presentation* of the bill to the governor. This is expressed or clearly implied in decisions construing the con-

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<sup>10</sup> *State v. South Norwalk*, 77 Conn. 257, 260 (1904). For a discussion of the technical question as to when a bill is presented, see Oliver P. Field, *Presentation of Bills to the Governor*, 56 *American Law Review*, 898 (1922).

stitutions of Illinois,<sup>11</sup> Maryland,<sup>12</sup> and Vermont,<sup>13</sup> and in the opinion of the Attorney General of the United States.<sup>14</sup> In the New York case of *People v. Bowen*,<sup>15</sup> the court discusses broadly the power of the governor to approve after adjournment, and Judge Denio said that "I think he would not be justified in acting upon a bill after his ten days had elapsed, whether the session continued or not," without indicating at what point the ten days would begin, though the whole opinion is based on the theory that the ten days would be the same both before and after adjournment—that is, ten days after presentation to the governor.

(4) A fourth construction, and that adopted by the court in this case, is that a power to approve continues after legislative adjournment, but can be exercised only within the three days (Sundays excepted) after the adjournment, irrespective of when bills may have been presented to the governor. This fourth view rests upon the same arguments as the third, so far as it supports a power to approve within a limited period after adjournment. But in having the three day period run from adjournment rather than from presentation to the governor, this view runs counter to the constitutional language, and finds no support in the statement of the Supreme Court of Georgia<sup>16</sup> that the governor had signed bills within five days after adjournment.

The recent Connecticut decision involved no issue as to computation of time, except as to when the three day period begins.<sup>17</sup> The court's opinion does not indicate a consideration of alternative (3) as set out above, but explicitly limits the choice to an unlimited period upon the part of the governor as

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<sup>11</sup> *Town of Seven Hickory v. Ellery*, 103 U. S. 423 (1881), construing the Illinois constitution of 1848. And see *Board of Education v. Morgan*, 316 Ill., 143 (1925).

<sup>12</sup> *Lankford v. Connty Commissioners of Somerset County*, 73 Md., 105 (1890).

<sup>13</sup> *Hartness v. Black*, 95 Vt., 130 (1921).

<sup>14</sup> 32 Opinions of the Attorney General, 225 (1920).

<sup>15</sup> 21 N. Y., 517 (1860).

<sup>16</sup> *Solomon v. Commissioner of Cartersville*, 41 Ga. 157 (1870).

<sup>17</sup> For the exclusion of Sundays and holidays, see *State v. Holm*, 172 Minn., 162, 215 N. W., 200 (1927), and note in 52 A. L. R. 339.

contrasted with a period limited to three days from adjournment. The authorities cited by the court support the third rather than the fourth alternative, as does the explicit language of the constitution of Connecticut. Not only this, but substantially the whole argument against an unlimited period for approval supports the third as well as the fourth alternative.<sup>18</sup> The arguments as to practical and contemporaneous construction as presented by the court in no way support the view of the court as distinguished from that based on time of presentation.

But the court apparently proceeds upon the theory that, in view of a Connecticut statute not referred to in its opinion, there is no difference between the third and fourth alternatives, for its language in at least one place appears explicitly to adopt the third alternative. Section 42 of the General Statutes of Connecticut provides:

"All bills for acts and resolutions which shall be passed by the two houses of the general assembly, but which shall not have been engrossed prior to the final adjournment thereof, shall be transmitted to the governor for his approval; and, if approved by him, he shall sign the same, indorsing his approval thereon, and transmit the same to the secretary; and the secretary shall thereafter engross the said bills, under the direction of the engrossing committee, and, when so engrossed, they shall receive the signatures of the presiding officers of the two houses, the clerks and the governor, in the manner provided by law; and such bills so passed, signed and approved, shall from and after their said approval have the same force and validity as all other laws of the state."

This was argued by McCook's counsel to require that all bills be presented to the governor "*at the moment of adjournment*." Were this done, the three days after adjournment would be

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<sup>18</sup> There may occasionally be an extreme case under the third alternative in which by mistake a measure actually passed fails to be presented promptly to the governor. The only case of this character known to the author of this comment is that of an act passed by the Illinois legislature in 1925, but overlooked by the clerical officers of the legislature and not presented to the governor until May 19, 1926. See Cahill's Illinois Revised Statutes, 1927, p. 2296.



identical with three days after presentation. But, with 322 bills passed at the close of the session in 1925, preparation even in unengrossed form for presentation to the governor would take some time, and an identity of time of presentation with time of adjournment could never in fact exist. The court's view that it must choose between a fixed period after adjournment and an unlimited period for approval derives some support from the fact that nineteen days intervened between legislative adjournment and the presentation and approval of the measure involved in the present case. And obviously a two-months' interval such as occurred with respect to one act in 1927 is so excessive as to constitute an abuse.

As a matter of fact, were the statute in the *McCook* case not being held invalid on other grounds, it would have been saved by having the three days begin with presentation to the governor rather than with the legislative adjournment. In his message to the special session of the Connecticut General Assembly, convened on August 6, 1929, Governor John H. Trumbull asserted that the measure involved in this case was signed by him on the day of its presentation, although the record shows this to have been nineteen days after legislative adjournment.

The decision in the *McCook* case presents two practical questions: (a) The court having explicitly declared that all acts not signed within three days after the final adjournment of the legislature are void, some fifteen hundred legislative acts (almost all adopted in the period 1919-1929) immediately became subject to successful attack; (b) Under present legislative methods, it is physically impossible to present all measures to the governor within three days after legislative adjournment, and obviously impossible, therefore, for the governor to consider such measures.

The practical problem as to the time available for executive consideration of measures was fully discussed by the court:

"The burden imposed upon the governor of having a very considerable percentage of all bills passed at the session of the general assembly returned to him after its final adjournment—many of these the most important of the session—literally prevents his fair consideration of

the merits of this mass of legislation within the constitutional three day period. If he signs all of these bills the people may be deprived of the governor's considered view of these measures and the constitutional check upon hasty, ill-considered and publicly inimical legislation removed by the pressure of the burden placed upon the governor. On the other hand, bills which the governor does not sign, however meritorious they may be, will fail to become law. The avoidance of this untoward public situation is neither hard to see nor difficult to enforce. A better distribution and a prompter disposition of the business of the general assembly and the avoidance of leaving the most important bills to the closing days of the session will not only relieve the governor from the burden of a duty which is impossible of proper performance, except under most exceptional circumstances, but will also tend to give the general assembly the opportunity for more extended consideration of important measures. A recess taken by the general assembly, after it is through with its business, of ten days, would give the governor the opportunity of fairly considering bills returned to him, and give the general assembly the opportunity of reconsidering bills returned to it disapproved of by him. This course would not conflict with the power of the governor in signing bills within the period prescribed by the constitution after the final adjournment of the general assembly."

The court's suggestions are intelligent and in part practical. The practice of enacting a great mass of legislation in the confusion of the closing days of a legislative session is foolish and indefensible, but the court's remarks are not likely to alter such a bad practice. The suggestion of a ten day recess is practicable. The liberal constitutional limit of five months upon the length of the legislative session in Connecticut would make it readily possible to treat the session as terminating (for the original consideration of bills) fifteen days before the constitutional expiration of the session. A recess of ten days or more would then permit the preparation of bills and their submission to the governor before the termination of the recess. Although some

bills probably would not be ready for presentation to him for perhaps ten days after their passage, he would have three days after presentation of each bill. The reconvening after the recess would probably be a mere formality, but the formality would save the day constitutionally. All the real work of the legislature having been done before its recess, the experience of Illinois with a similar plan is that a quorum does not attend when the legislature reconvenes, but on reconvening, a motion for final adjournment is about the only business, and a quorum is not necessary for the adoption of such a motion.

Aside from the immediate problem as to some 1500 laws affected by the *McCook* case, it is from a practical standpoint immaterial whether the three day period begins with adjournment or with presentation of a bill to the governor. Certainty of rule is here more important than technical accuracy of constitutional construction. Three days is normally a long enough period for consideration of one bill, but is obviously insufficient for three or four hundred bills. A distribution of the governor's work of passing upon bills may be accomplished either (1) by allowing him three days after presentation of each bill upon final adjournment, the preparation for presentation of necessity taking some time, the bills coming to him day by day as they are ready, and the governor having a number of days to dispose of the whole mass of legislation; or (2) by accomplishing the same purpose by a recess after the completion of the work of legislation, with a subsequent formal session for adjournment. Either plan would seem to be supported by the Connecticut constitutional text, but the limitation to the second by the rejection of the first is harmless even under the present legislative practice of passing the great bulk of legislation at the end of the session. And the second plan has the advantage of imposing a specific time limit not present in the first. It is, however, obvious that, under any adjustment, the constitutional limit of three days is too short. This situation can only be met by constitutional amendment. Such an amendment may wisely abolish the pocket veto, and provide, as does Colorado, that where the adjournment of the General Assembly prevents the return of a bill "it shall be filed with his objections, in the office

of the secretary of state within thirty days after such adjournment, or else become a law."<sup>19</sup>

## II. THE MCCOOK CASE AND THE VALIDATING ACTS.

### *Effect of the McCook Case.*

One of the immediate effects of the McCook case was a material unsettling of the law of Connecticut. The court said that all legislative acts, whether public or private, signed by the governor more than three days after the final adjournment of the state legislature, are void. This statement affects some fifteen hundred legislative acts, passed by the legislature over a period of more than ten years. Many of these fifteen hundred measures constitute an important part of the public law of the State and have been acted upon for some years as valid parts of that law.

The court expressly stated that it realized the serious consequences that might follow a declaration that such a great mass of legislation is void. Technically, the decision of the court declared invalid only the one legislative act directly involved in the McCook case, but it opened the door for immediate attack upon all other statutes which had been approved more than three days after legislative adjournment and, under the view announced by the court, attacks were bound to succeed.

It is of interest to indicate a few of the things sought to be accomplished by acts passed in 1927 and generally regarded as part of the State's law, but now falling within the condemnation of the McCook case: the taxation of motor busses and of places of amusement; the motor vehicle guest statute; substantial variations in conditions of payment to injured workmen under the workmen's compensation act; the creation of the state judicial council and of new offices in State and local government; purchase and sale of public property; penalties for failure to file tax lists; regulation of aviation, with penalties of fine and imprisonment for the violation of the regulations imposed. These

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<sup>19</sup> Colorado Constitution of 1876, Art. IV, sec. 11.

illustrations may readily be multiplied by ten, if all laws affected by the McCook case are examined. Under these and numerous other statutes (open to the same objection) money had been paid from the public treasury; property had been conveyed from and to the State; persons had been deprived of remedies previously existing by statute or at common law; large sums of money have been collected in public taxes, and penalties had been imposed under tax laws; individuals had been tried and convicted of criminal offenses, and some of them may still be serving sentences under such convictions. If the statutes under which these transactions occurred were void, what as to the transactions themselves? And what if all of these apparent laws ceased to be of any effect for the future? These very practical questions demanded some immediate answer. An answer was given by the special session of the Connecticut General Assembly which convened on August 6, 1929. Whether this answer shall stand awaits determination by the Supreme Court of Errors of the State. Let us first consider the legislative answer, and then some of the issues that it presents for later judicial determination.

### *The Validating Acts.*

Of the eight acts passed by the recent special session, one has to do with the new revision of the general statutes, and two were merely incidental to the fact that there was a special session. Five measures were devoted directly to the situation presented by the McCook case. Stated briefly, the five acts taken together seek to accomplish the following results:

(1) To reenact and make effective for the future all bills in the official records of the State (other than those specifically declared invalid by the courts) which were passed by the two houses, and approved by the governor more than three days after adjournment. The measures so sought to be enacted for future effect are not set out in full or even enumerated.

(2) To make every such bill, whether relating to civil rights or criminal matters, effective from the date of original signature or approval by the governor, and to validate the presentation and approval of such bills.

(3) To give to every act done or omitted, liability or penalty incurred under, or imposed, or protection afforded by the terms of any such bill, as full and complete effect as if such bills were signed within three days after legislative adjournment.

(4) To restrict the contest of the validity of such measures (a) by making the official records presumptive evidence that all constitutional requirements as to such bills had been complied with, such record to be attacked only by mandamus to correct the record, and (b) by forbidding a cause of action or defense in a civil action based on the fact that the governor had signed a bill more than three days after adjournment.

*Are the Validating Acts Constitutional?*

The provisions noted under the fourth subdivision are capable of effective attack as undue encroachments upon judicial authority, but they are not essential to the general purpose sought to be accomplished. So far as the first point is concerned, it is of doubtful wisdom to enact some fifteen hundred statutes by blanket description, without even an enumeration, and such a plan would be clearly invalid under many State constitutions. But, whatever its wisdom, this plan of legislation does not appear open to constitutional attack in Connecticut.

In opposition to the view just expressed, it may be urged that that legislature is itself violating the law, for section 35 of the General Statutes provides that:

"Every bill for a public act amending or repealing any of the statutes of the state, introduced into the General Assembly, shall cite the statute to be amended or repealed, or so much thereof as may be necessary to show the effect of such amendment or repeal."

A sufficient reply is that the special session was validating prior transactions and reenacting, not amending or repealing. But even if the validating acts were within the terms of this section, one session of the legislature apparently has no authority to determine how a succeeding session shall exercise powers

constitutionally belonging to it.<sup>20</sup> The statute, while announcing a desirable policy, would most likely not constitute a legal limitation upon the procedure adopted by subsequent legislative sessions.

The issues of importance for judicial determination are, therefore, the retroactive effect and validation of prior acts or proceedings, as indicated under subdivisions (2) and (3) above. Validating acts have a long history in Connecticut,<sup>21</sup> and retroactive laws of certain types have been upheld at least since 1822. And validating acts are retroactive in that they seek to cure defects in past proceedings. But there are limits upon such legislation and it is for the court to determine these limits. The limits are primarily set by the following constitutional provisions:

(1) The federal constitution of 1787 provides that no State shall pass any *ex post facto* law.

(2) The fourteenth amendment to the federal constitution, adopted in 1868, forbids any State to deprive any person of "life, liberty or property without due process of law" or to deny to any person within its jurisdiction "the equal protection of the laws."

(3) The Connecticut constitution of 1818 forbids deprivation of "life, liberty or property, but by due course of law," and provides that all men "are equal in rights." These provisions are substantially the same as the "due process of law" and "equal protection of the laws" clauses of the fourteenth amendment.

(4) The Connecticut constitution of 1818 provides that "no person shall be arrested, detained or punished except in cases clearly warranted by law."

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<sup>20</sup> For discussions of the power of one legislative session to restrict its successors in the proposal and submission of constitutional amendments, see *Murphy Chair Co. v. Attorney General*, 148 Mich. 563 (1907); *Lovett v. Ferguson*, 10 S. D. 44 (1897); *In re Denny*, 156 Ind. 104 (1901); and *State v. Davis*, 20 Nev. 220 (1888).

<sup>21</sup> *Goshen v. Stonington*, 4 Conn. 209 (1822); *Mather v. Chapman*, 6 Conn. 54 (1825); *Beach v. Walker*, 6 Conn. 190 (1826).

All four of these provisions may be argued to forbid retroactive criminal laws. Only the second and third relate to civil rights. Since the decision by the United States Supreme Court in 1798 of the Connecticut case of *Calder v. Bull*,<sup>22</sup> it has been established that the prohibition of *ex post facto* laws relates only to retroactive criminal laws, and Connecticut has no constitutional provision forbidding retroactive civil laws. The fourth is explicitly limited to criminal cases. What limits do these constitutional provisions impose upon retroactive legislation? This question must be differently answered under varying circumstances. Three classes of cases may be distinguished:

(1) The legislature cannot through a validating act exercise a power which it never possessed. An act of 1927 sought to validate the assessment lists and grand lists of the town of Branford so far as they assessed a 99 year lease of real property to the lessee, whereas all other land under lease either in Branford or elsewhere in the State was taxed to the owner. The court, through Chief Justice Wheeler, said that such a classification denied equal protection of the laws and equality of rights, and said "Curative acts cannot cure a want of authority to act at all. \* \* \* A statute will not be permitted to act retrospectively so as to validate what was before void because in conflict with State or federal constitution. Our General Assembly was without power to validate what it could not constitutionally authorize."<sup>23</sup> But had there been power to do the thing, and a defect merely in the method of doing it, a validating act may cure the defect,<sup>24</sup> as the same Justice suggested in 1916. To take a specific illustration, there was a power, later sustained by the Connecticut Court, to enact the automobile guest act of 1927, but the power was defectively exercised, because the governor did not approve in time. Can this defect be corrected by later legislation, and the act made operative from 1927, or is the defect incurable as to the past because it arose from what the court regards as a violation of the constitution? The Branford case does not answer this question.

<sup>22</sup> 3 Dallas, 386 (1798).

<sup>23</sup> *Montgomery v. Town of Branford*, 107 Conn., 697 (1928), pp. 705, 707.

<sup>24</sup> *Whittelsey v. Town of Windsor Locks*, 90 Conn. 312 (1916).



(2) The legislature cannot pass an act in 1929 and make it retroactive so as to disturb vested rights or punish acts innocent at the time of their commission. To punish, by act of 1929, conduct of 1927, innocent at that time, would clearly be *ex post facto* and not "clearly warranted by law." To deprive of vested property or other interests by retroactive legislation would run counter to the 14th amendment and to the constitution of Connecticut. In 1822, when dealing with a statute validating marriages, the court went farther in the disturbing of established property rights than it would probably do to-day,<sup>25</sup> and than it might be permitted to do in view of the present construction of the fourteenth amendment. The United States Supreme Court went so far in 1928 as to say that a federal tax statute proposed in February and approved on June 2, 1924, could not constitutionally have retroactive effect so as to apply to a gift made on May 23, 1924.<sup>26</sup> But in this case there was no prior action, or effort to act, upon the part of Congress. If a bill were passed in 1927, which has the appearance of law and was generally regarded as law, may legislative action of 1929 retroactively cure a defect in the act of 1927 and make it operative?

This question is different from that answered by the United States Supreme Court. Congress, when it acted in June, 1924, had no constitutional power to act for a prior period. The Connecticut legislature, when it acted in 1927, had power to act and sought only to act for the future, and the defect was only in the method of exercising the power. Can such a defect be cured by subsequent legislation?

(3) Validating acts are freely used in Connecticut and other States. They will (and must) continue to be used so long as public officers are human and make mistakes. The Connecticut rule as to such acts, stated in 1859 and repeated with approval in 1928 is: "When a statute is expressly retroactive and the object and effect of it is to correct an innocent mistake, remedy a mischief, execute the intention of the parties, and promote

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<sup>25</sup> Compare *Goshen v. Stonington*, 4 Conn, 209 (1822) with *Shay's Appeal*, 51 Conn. 162 (1883).

<sup>26</sup> *Blodgett v. Holden*, 275 U. S. 142 (1928); *Untermeyer v. Anderson*, 276 U. S. 440 (1928).

justice, then, both as a matter of right and of public policy affecting the peace and welfare of the community, the law should be sustained."<sup>27</sup> This is subject to the rule that the legislature may not by curative legislation validate an act that it never had power to enact. Clearly, in Connecticut, where the legislature has authority in the first place to prescribe or dispense with certain forms, it may retroactively cure a defect due to failure of administrative officers to comply with forms which it did prescribe. If it requires a certain form of oath, or action on a certain day in the levy of a tax, it may retroactively excuse failure to employ the proper form of oath or to act on the proper day.

Legislative power to validate is often said to extend to the ratifying of something which it was lawful for the legislature to authorize or to do in the first instance.<sup>28</sup> But in the present case, while there was power to pass an automobile guest statute in 1927, there was, under the decision of the court, no power to pass such an act subject to executive approval more than three days after adjournment. If the legislature had prescribed that a certain act should be performed within a certain time, it could cure the defect occasioned by failure to do so. Such a defect would usually in fact be a matter of administrative detail. Is the legislature powerless to cure a defect in time of prior approval of a statute, either because the requirement is a constitutional one or because it is not a matter of administrative detail? Clearly there is a difference between the present case and the ordinary case of validation, in that the legislature could not in the first place have lawfully dispensed with the constitutional requirement as to executive approval.

The extent of power to cure the defect occasioned by the failure to approve in proper time depends primarily upon the effect to be given to the legislative action of 1927. The court has said

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<sup>27</sup> *Savings Bank v. Allen*, 28 Conn. 97 (1859), p. 102, quoted in *Montgomery v. Town of Branford*, 107 Conn. 697 (1928), pp. 704-705. See also *Atkins v. Nichols*, 51 Conn. 513 (1884) and *Daly v. Fisk*, 104 Conn. 579 (1926).

<sup>28</sup> For an interesting discussion of validating legislation in another jurisdiction, see E. J. Verlie, *Retrospective Legislation in Illinois*, 3 *University of Illinois Law Bulletin*, 28 (1920).

that acts signed after the three day period "are void." But clearly something was done by the legislature in 1927, and reliance was generally placed upon what the legislature then did. Can effect be given to such action of 1927 by curative legislation of 1929? Obviously the legislature could not in 1929 deprive the motor vehicle guest of substantially all remedy for injury, and make this deprivation apply retroactively back to 1927. To do so would be violative of due process of law, but the legislature is not doing merely this. It is taking an action of 1927, generally supposed to be law, and seeking to cure a defect in its enactment. But if the act of 1927 was void, can the defect be cured? This depends upon the effect to be given to it. Mr. Justice Field, speaking for the United States Supreme Court, said in 1886:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."<sup>29</sup>

If we take this view, there is nothing to cure or validate. Mr. Chief Justice Butler of the Supreme Court of Errors of Connecticut said in 1871:

"Every law of the legislature, however repugnant to the constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned at the bar of private judgment, and if thought unconstitutional resisted, but must be received and obeyed, as to all intents and purposes law, until questioned in and set aside by the courts. This principle is essential to the very existence of order in society."<sup>30</sup>

Under this view there is something to cure or validate, unless it be urged that the defect in executive approval prevented the earlier creation of a "law of the legislature." The modern tendency of the courts is more liberal than the view expressed by Mr. Justice Field. With numerous acts passed by State legislatures, and observed as law for long periods by the people, undue confusion and difficulty is created by denying all effect to acts

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<sup>29</sup> Norton v. Shelby County, 118 U. S. 425 (1886).

<sup>30</sup> State v. Carroll, 38 Conn. 449, 472 (1871).

subsequently held invalid by the courts. There is much to be said for the present judicial tendency of permitting later legislation to validate proceedings under void statutes, and later legislative amendments to transfer void into valid statutes.<sup>31</sup> Decisions upholding such actions directly support the recent validating acts of Connecticut, and find support in utterances of the Connecticut court. Such a view would support the validating acts, irrespective of whether they confirm deprivations of civil rights or ratify criminal penalties imposed under earlier acts. If such validation did not deprive of due process of law in civil matters it would apparently not be *ex post facto* as to criminal matters.

*The Situation if Validating Acts are Unconstitutional.*

But what would be the situation if the court takes a different view, and holds that the various acts sought to be validated at the special session of 1929 are void, and are of no effect until their reenactment in 1929? As to completed transactions between private parties, entered into in reliance upon such acts, there would seem to be little difference in result. The doctrine of estoppel would almost certainly in such cases be employed to prevent either of the parties from escaping the liabilities or duties that he had assumed. The same would be true of transactions entered into between individuals on the one hand and the State or other governmental bodies on the other in reliance upon such laws. If the State had purchased property from an individual or had sold property to the individual, either party

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<sup>31</sup> The effect of unconstitutional statutes is most adequately covered in a series of articles prepared, under the supervision of the present writer, by Professor Oliver P. Field of the University of Minnesota: *The effect of an Unconstitutional Statute in the Law of Public Officers: Effect of Official Status*, 13 Minnesota Law Review, 439 (1929); *The Status of a Private Corporation Organized under an Unconstitutional Statute*, 17 California Law Review 327 (1929); *The Status of a Municipal Corporation Organized under an Unconstitutional Statute*, 27 Michigan Law Review, 523 (1929); *The Effect of an Unconstitutional Statute in the Law of Public Officers: Liability of Officer for Action or Non-Action*, 77 University of Pennsylvania Law Review, 155 (1928). See also Oliver P. Field, *Effect of an Unconstitutional Statute*, 1 Indiana Law Review, 1, and 100 Central Law Journal, 145 (1927), and Max P. Rapacz, *Protection of Officers who Act under Unconstitutional Statutes*, 11 Minnesota Law Review, 585 (1927).

would almost certainly be estopped from alleging that the transaction was improper, unless he were able to place the other party in the same position as that existing prior to the transaction.

Nor is difficulty likely to present itself with respect to the ordinary transactions and administrative details of State and local government. With respect to taxes collected under the laws involved in the validating acts, little difficulty would present itself, because of the substantial impossibility of recovering taxes voluntarily paid.

With respect to criminal proceedings, differences in situations present themselves. A person who may have been convicted and who has served his sentence for violation of the aviation act of 1927 would have little in the way of redress. Technically he has been unlawfully deprived of his liberty under a void statute, if the invalidity of the statute has not been cured by the validating act. What remedy would he have for such deprivation? His redress, if any, would be by suit against someone. He has no remedy by suit against the State. Under modern decisions there is little possibility of his being permitted to recover damages from the person making the complaint, from the officer making the arrest, or from the jailer or warden who may have detained him in confinement either before conviction or under sentence after conviction. The judge who presided at his trial would clearly be subject to no liability under the great weight of authority. If a validating act has been ineffective to cure defects in the proceeding under which the person has been imprisoned, he is in the position of one who has suffered a legal injury but who has no remedy.

The individual who has been convicted, let us say under the same statute, but who has not yet completed the service of his sentence, will be in a different position, should the validating acts be held not to cure all defects. He would be entitled to release. But is he entitled to release merely by demanding it? Would the jailer or warden be liable for detaining him until there should be an actual decision as to the validity of the act under which he was committed, or a decision as to the validity of the validating act? Under the view expressed by the Supreme Court of Errors of Connecticut in 1871 and quoted above, there would seem to be

no liability attached to the person so detaining the convicted person, until there were a specific determination by the court, making clear that the detention is illegal.

Irrespective, therefore, of whether the validating acts be regarded as curing all defects of the various acts rendered void under the McCook decision, there would be little material difference as to completed civil transactions, and no very great difficulty with respect to criminal proceedings under the statutes. But inequalities would result in many cases, if the validating acts do not cure past defects. Take the automobile guest statute of 1927, for example. A guest who has sought damages for injury between 1927 and 1929, and who was denied relief because of this statute, is now precluded from again seeking relief, if his case has been closed. But the person injured as a guest during the same period and perhaps on the same day, whose case has not yet been tried or closed, may be permitted to allege the invalidity of the statute and to obtain relief, if the validating acts do not accomplish their purpose as to past transactions. Similar inequalities would present themselves as to other statutes, and where the original enactment may have occurred ten years ago, the number of such inequalities would be greater than under a statute enacted in 1927. Inequalities of the same type would present themselves in criminal cases.

#### *Conclusions.*

From what is said above the following general conclusions may be drawn:

(1) The Connecticut legislature has power to reenact, by the blanket process, all of the various laws affected by the McCook decision, so far as such reenactment is to bring these laws into operation for the future.

(2) The effort of the special session of the Connecticut legislature to control the merit of cases and the weight of evidence is of doubtful validity, because an infringement upon powers properly judicial.

(3) There is substantial argument in support of the power of the legislature to validate transactions under the statutes rendered void by the terms of the McCook decision.

(4) If there is no legislative power to validate acts done under the statutes rendered invalid by the McCook decision, the same result as that sought by the validating acts is accomplished as to numerous prior transactions, and particularly as to completed transactions, under other legal rules recognized by the Connecticut court. But inequalities would result which may be avoided by sustaining the validating acts.

